



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

DRAFT

October 14, 2004

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Greg Dewar
Dewar & Associates
237 4th Avenue, Suite A
Venice, CA 90291

Dear Mr. Dewar:

You have requested a formal opinion letter from the Ethics Commission regarding the application of San Francisco Campaign and Governmental Conduct Code section 1.122 to candidates who are seeking election to the Board of Supervisors on the November 2004 ballot.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *S.F. Charter Section C3.699-12*. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. *See id.* Informal advice does not provide similar protection. *See id.*

Because you seek advice regarding specific actions that your client may take in the future, the Commission is treating your question as a request for a formal opinion.

Summary of Advice

Campaign and Governmental Conduct Code ("C&GCC") section 1.122 permits a candidate for City elective office to expend campaign funds only when the primary purpose of such an expenditure is to support the candidate's own candidacy or to cover expenses associated with holding office. Whether the primary purpose of a particular expenditure is to support a candidate's own candidacy is a question of fact.

California Government Code section 85501, which is incorporated into local law by C&GCC section 1.106, prohibits the controlled committees of local candidates from making independent expenditures to support or oppose other candidates. The Ethics Commission will defer to the Fair Political Practices Commission, the state agency charged with interpreting section 85501, regarding whether an expenditure such as the one you described would constitute an independent expenditure prohibited by sections

85501 and 1.106. Accordingly, the Commission will request advice from the FPPC to resolve this question.

Brief Statement of Facts

You are a campaign consultant for a candidate seeking election to the Board of Supervisors. This November, voters in San Francisco will use a new voting system to elect candidates for the Board of Supervisors, Ranked-Choice Voting, also known as Instant Runoff Voting. Ranked-Choice Voting ("RCV") allows the City to elect a candidate by a majority vote without the need for a separate run-off election. Under the RCV system, voters will elect members of the Board of Supervisors by ranking three different candidates in order of preference – selecting a first-choice candidate in the first column on the ballot, and different second- and third-choice candidates in the second and third columns on the ballot. If any candidate receives a majority of the voters' first choices, that candidate is declared the winner. If no candidate receives a majority of the voters' first choices, the candidate who received the fewest first choice votes is eliminated. Voters who picked the eliminated candidate as their first choice will then have their second choice counted as their vote. If any remaining candidate then has a majority of the votes cast, he or she will be declared the winner. If no candidate obtains a majority of the votes cast, the process of eliminating candidates and transferring votes will continue until one candidate has received a majority of the ballots cast.

You have informed the Ethics Commission that one of your clients would like to send a mailing urging voters to rank your client as their first choice on this November's RCV ballot. In addition, your client would also like to use the mailing to urge the voters to rank another candidate in the same race as their second choice on this November's RCV ballot. Your client proposes to pay for the entire cost of the mailing with her campaign funds.

By way of example, you presented the following hypothetical facts: Samantha Carter is a candidate in the District 5 Board of Supervisors race. One of her opponents is Jack O'Neill. Carter has endorsed O'Neill for the second ranked spot on the ballot. Carter would like to send a direct mailing to her supporters and other voters to urge them to select her as their first choice on the ballot and O'Neill as their second choice. Carter wants to pay the entire costs of the mailing.

Finally, you have informed the Commission that under the RCV system, it is quite common for candidates to work with each other and endorse each other for various positions on the ballot. You state that under the RCV system, candidates have staged press conferences and talked in person to voters about which candidates running for the same office should be ranked second and third on the RCV ballot.

Discussion

Local law provides that campaign funds may be used only on behalf of the candidacy for the office for which the funds were raised. Specifically, C&GCC section 1.122(b)(i) provides:

Except as otherwise provided in this Chapter, funds in a candidate's campaign account may be used only on behalf of the candidate for the office specified in the candidate's declaration of intention filed under subsection (a)¹ or for expenses associated with holding that office. Contributions solicited or accepted under this Section for an individual shall not be expended for the candidacy of any other individual or in support of or opposition to any measure.

The question presented by your inquiry is whether section 1.122 prohibits a candidate who will be elected under the RCV system from using his or her campaign funds to urge voters to rank another candidate as a second or third choice. This question is one of statutory construction.

In any case involving statutory construction, the fundamental task is to determine the legislative intent in order to effectuate the law's purpose. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 572. In determining such intent, we must look first to the words of the statute themselves, giving the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal. 3d 1379, 1386-1387. The literal meaning of an ordinance, however, must be in accord with the ordinance's purposes. *See Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 798. Accordingly, we must consider "the object to be achieved and the evil to be prevented by the legislation." *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.

Read in isolation, the plain language of section 1.122 would prohibit a candidate from spending any campaign funds if the spending of such funds would benefit another candidate or ballot measure, regardless of how minimal such a benefit would be to the other candidate or ballot measure or how beneficial the expenditure would be to the candidate making the expenditure. Under such a literal reading, section 1.122 would permit your hypothetical candidate Carter to expend campaign funds if the only purpose of expending such funds is to advance her own candidacy. But such a literal reading of section 1.122 is not in accord with the purposes of the ordinance.

We have previously stated that the purpose of section 1.122 is "to ensure that campaign funds are spent only for the candidate to which the donors provided the funds." *See Ethics Commission's June 17, 2002 Advice Letter to Peter Bagatelos ("Bagatelos letter")*. The reason for this is that "all contributions deposited into [a candidate's] campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding office." *See Cal. Gov't Code § 89510(b)* (incorporated into local law by C&GCC § 1.106). As such, section 1.122 is meant to ensure that funds held in trust in a campaign account are used in accordance with that trust.

¹ Section 1.122(a) states: "No intended candidate for any City elective office, and no committee acting on behalf of a candidate, shall solicit or accept, or cause to be solicited or accepted, any contribution unless and until said candidate shall have filed a declaration of intention to become a candidate for a specific City elective office with the Department of Elections on a form to be prescribed by the Director of Elections. Subsection (b)(ii) of section 1.122 discusses how funds held by an individual who ceases to be a candidate may be disbursed; subsection (c) discusses the use of surplus funds that are held by a candidate or committee. Your letter did not raise issues regarding either of these subsections.

In light of this purpose, the Commission has previously refused to take a literal reading of section 1.122. In the Bagatelos letter, we concluded that a candidate was permitted to spend campaign funds on officeholder expenses for the office to which the candidate was elected because such expenditures were consistent with the purpose of section 1.122. We concluded that "a contributor who supported the candidate's election would not likely be surprised or troubled that the contributions would continue to support the candidate to which they were donated."²

Likewise, a contributor to a candidate would not likely be surprised or troubled if a candidate made an expenditure that partially benefited another candidate so long as the primary purpose of the expenditure was to support the candidate making the expenditure. Accordingly, the Commission concludes that section 1.122 permits a candidate for City elective office to expend campaign funds only when the primary purpose of such expenditure is to support his or her own candidacy or for expenses associated with holding office. Under section 1.122, a candidate may not spend his or her campaign funds when the primary purpose of the expenditure is to urge voters to elect another individual to public office, especially one running for the same office as the candidate.

Whether the primary purpose of a particular mailing such as the one you describe in your request for advice is to urge voters to support a candidate's own candidacy is a question of fact. The Commission recognizes that in some situations the primary purpose of an expenditure by a candidate to urge voters to rank another candidate second or third may actually be to help the first candidate get elected. For example, as you explained in your letter, under the RCV system, candidates have worked with each other during the course of the campaign and have publicly endorsed each other. We assume candidates have engaged in these activities, in part, as a way to convince the supporters of other candidates to rank the first candidate second or third on the RCV ballot. In this type of situation, a candidate may wish to continue to align himself or herself with another candidate in a mailing to the other candidate's supporters as a means of picking up second or third choice votes for himself or herself. In doing so, the primary purpose of the expenditure is not to urge voters to elect another individual to public office, but rather is to further the candidate's own candidacy.

The Commission also recognizes that under a different factual situation, the primary purpose of an expenditure by a candidate to urge voters to rank another candidate second or third would be to urge voters to elect the other candidate to public office. For example, a candidate may decide that he or she no longer has a chance of being elected and has decided to support another individual for that office. In such a situation, urging voters to rank the other individual second or third would not be done with a primary purpose to elect the candidate who is sending the mailing, but rather to elect the other individual. Likewise, a candidate may make such expenditures as a way to circumvent campaign contribution limits. It is not difficult to imagine a situation where one candidate enters into a race for the purpose of raising and spending funds to support another candidate whose candidacy has always been more viable. Section 1.122 would prohibit either of these examples.

² Section 1.122 was amended in 2003 to codify the Commission's conclusion in the Bagatelos letter.

You have not provided us with specific facts related to the primary purpose of your client's proposed mailing. Accordingly, we do not reach any conclusions regarding whether the specific mailing in question would violate section 1.122 other than to conclude that the mailing will not violate section 1.122 if the primary purpose of the mailing is to support the candidate's own candidacy and not the candidacy of another individual.³

Although your letter requested an interpretation of section 1.122, the Commission would like to make sure that you are aware that California Government Code section 85501, which is incorporated into local law by C&GCC section 1.106, prohibits the controlled committee of a local candidate from making independent expenditures to support or oppose other candidates.

It is unclear whether an expenditure such as the one you described in your request for advice constitutes an independent expenditure. An independent expenditure is defined as

an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

Cal. Gov't Code § 82031. The Ethics Commission believes that in order to determine whether an expenditure such as the one you described in your request for advice is an independent expenditure depends on a factual analysis regarding the primary purpose of the expenditure. But the Ethics Commission will defer to the Fair Political Practices Commission ("FPPC"), the state agency charged with interpreting section 85501, regarding whether sections 85501 and 1.106 prohibit such an expenditure. Accordingly, the Commission will request advice from the FPPC to resolve this question and provide you with a copy of the advice when it is received.

I hope you find this information useful. If you have further questions, please do not hesitate to contact me at (415) 581-2300.

Sincerely,

John St. Croix
Executive Director

By: Mabel Ng
Deputy Executive Director

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³ In your letter, you state that your client's proposed mailing will help explain to voters how RCV will work, and thus will promote the education of voters about the new system. As explained above, the secondary beneficial effects of an expenditure are irrelevant. The question that must be answered is whether the primary purpose of the expenditure is to advance your client's candidacy. If so, then the expenditure will be made in compliance with section 1.122. You also state that it "seems strange" that "candidates are free to advocate in person, to the press, and at community meetings— but it is unclear they can say the very same things to voters in a paid political announcement." Section 1.122(b) governs the expenditure of campaign funds raised by candidates. A verbal endorsement of a candidate made in person, to the press, and at community meetings does not entail the expenditure of such funds. Accordingly, section 1.122 is not applicable to this example.